BNA'S LAW REPRINTS EDITORIAL NOTE: THE MOTION OF THE SOLICITOR GENERAL FOR LEAVE TO FILE THE SUPPLEMENTAL BRIEF AS AMICUS CURIAE WAS DENIED BY THE COURT ON APRIL 19, 1982, BUT IS INCLUDED HERE IN THE INTEREST OF PROVIDING A COMPLETE RECORD.

MOTION FILED
APR 14 1982

No. 80-2162

In the Supreme Court of the United States

OCTOBER TERM, 1981

RAMAH NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC., APPELLANTS

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MOTION FOR SPECIAL LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2162

RAMAH NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC., APPELLANTS

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MOTION OF THE UNITED STATES FOR SPECIAL LEAVE TO FILE SUPPLEMENTAL BRIEF AS AMICUS CURIAE

The Solicitor General, on behalf of the United States, as amicus curiae, moves the Court for special leave to file a supplemental brief in this case.

1. On October 5, 1981, the Court invited the Solicitor General to state the views of the United States. In response, we urged the Court to note probable jurisdiction and finally to decide the controversy. Probable jurisdiction was noted on November 30, 1981. Because of the special responsibilities of the United States in Indian affairs, we submitted a brief on the merits in support of appellants. We took that occasion to suggest that the Court might wish to revisit the Indian Commerce Clause

as supplying a controlling rule, absent clear legislative guidance, in cases like the present.

2. Appellee State of New Mexico and seven other States have filed briefs urging affirmance. In each of these submissions there is a plea to the Court to seize the present opportunity to announce a broader and clearer rule to govern future cases. The major amicus brief supporting affirmance expressly joins issue with the United States as to what such a rule should be. See Brief of the States of Montana, Arizona, Nevada, Washington, and South Dakota as Amici Curiae at 11-17. Should the Court accept that invitation, it ought to have the benefit of the views of the United States articulated in less abbreviated form than in the brief now on file. Cf. *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 368 n.3 (1977); *id.* at 384-385, 392-393 (Marshall, J., dissenting).

3. After the United States filed its brief, the Court rendered two decisions of arguable relevance here: *Merrion* v. *Jicarilla Apache Tribe*, No. 80-11 (Jan. 25, 1982); *United States* v. *New Mexico*, No. 80-702 (Mar. 24, 1982). We would take this opportunity, if leave is granted, to comment on those cases as they may offer guidance here.

4. In all the circumstances, we believe the proposed supplemental brief will contribute to the Court's consideration of the issues presented.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1982

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

For some years, the Court has eschewed "treacherous generalizations," including any constitutional ruling, in Indian cases, deciding each of them on a "particularized inquiry" of competing governmental interests and examining often ambiguous provisions of treaties, statutes and regulations for preemptive intent. But the upshot is that State courts and lower federal courts are apparently at sea in their attempt to apply this Court's recent precedents to a variety of contexts. In consequence, controversy abounds and all courts—including this Court—are burdened with more litigation in this area than is necessary or salutary. Moreover, the prevailing uncertainty embar-

rasses the conduct of all three governments involved, tribal, state and federal, creates needless friction, and is likely to deter future on-Reservation investment and commercial arrangements. In this situation, we join the affected States in urging the Court to declare more broadly the controlling principles.

A.

1. The State of New Mexico, joined by a number of other States, would ask the Court to enact an unbending "legal incidence" test, permitting the State to tax any non-Indian doing business within State boundaries with tribal Indians, whether on or off their reservation, and regardless that the economic burden falls on the tribe, inhibits tribal taxation, and impairs the ability of the tribe to perform governmental functions. Only "a *clear* expression of congressional intent" to the contrary would overcome this "presumption." See Brief of the States of Montana, et al., at 16. This approach invokes *Thomas* v. *Gay*, 169 U.S. 264 (1898), as the last word on the subject, except only for the rejection of the "federal instrumentality doctrine" as a bar to State taxation of non-Indian contractors dealing with the United States or Indian tribes. And, predictably, the Court's recent decision in *United States* v. *New Mexico*, No. 80-702 (Mar. 24, 1982), will be invoked as announcing the controlling rule, the suggestion being that a tribe's commercial partners ought fare no better than those who contract with the United States. See Brief of the State of New Mexico at 13-16; Brief of the States of Montana, et al., at 6-7, 9-10, 16-17; Brief of the State of California at 6.

In sum, the States filing here would read the final concurring and dissenting opinion in *Washington* v. *Confederated Tribes*, 447 U.S. 134, 176-186 (1980), rather than the opinion of the Court (*id.* at 154-159), as announcing the governing principles, and would dismiss as aberrations the subsequent decisions in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), and *Cen-*

tral Machinery Co. v. *Arizona Tax Commission*, 448 U.S. 160 (1980).

2. Unsurprisingly, we cannot agree that the Court ought to extend *Thomas* v. *Gay*, a decision written at a time when Indian reservations were destined for extinction, and condoning only a tax on non-Indian cattle located on leased land within a reservation, with no subsequent tribal involvement. On the other hand, we do not question the Court's ruling in the *Colville* case, which we read as a brake on the abusive exploitation of a tax exemption. Indeed, we suppose the Court might well reach a like result with respect to sales from a post exchange on a military reservation over which the United States had retained exclusive jurisdiction if all residents of the State were indiscriminately invited to purchase tax-free cigarettes there and take them off the base for consumption elsewhere. Cf. *United States* v. *Mississippi Tax Commission*, 412 U.S. 363, 377-378 (1973). But we view *Colville* as announcing an *exception*, not the general rule.

The basic principle, we submit, is that, absent clear congressional authorization, the State may not tax or regulate transactions or activities directly involving tribal Indians on their reservation, at least when that situs is not merely a device for avoiding otherwise applicable State jurisdiction. When it applies, this immunity, we believe, embraces the entire transaction or activity, not merely the Indian partner. The question remains: Where does such a rule come from?

One approach is to view the establishment of Indian reservations as the setting aside of an enclave presumptively off limits to State law. Except as Congress has expressly provided otherwise, the organic act defining reservation boundaries may be deemed to confer a federal protective umbrella that shields tribal activities there—including commerce with non-Indians—from State interference. To be sure, unless particular treaties effectively so provide, or disclaimer provisions of State Enabling

Acts are so construed, or pervasive Federal regulations fully occupy the field, this requires the Court to imply a general congressional intent to preempt State law. Even so, given the "backdrop" of tribal territorial sovereignty, that may well be a permissible inference.

3. For our part, however, we believe there is no need to surmise what Congress intended where it has not spoken clearly. More appropriately, we suggest, the Court ought to declare the underlying constitutional rule applicable "absent governing Acts of Congress" (to borrow the words of *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)), leaving to Congress—where it has not yet clearly spoken—the task of making any accommodations it deems wise as a matter of policy. Cf. *Commonwealth Edison Co.* v. *Montana*, No. 80-581 (July 2, 1981), slip op. 16-17. Accordingly, we once again raise the banner of the Indian Commerce Clause, emboldened by the Court's most recent opinion in which the Clause is given honorable mention and *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), is apparently restored to full standing as a seminal precedent. See *Merrion* v. *Jicarilla Apache Tribe*, No. 80-11 (Jan. 25, 1982), slip op. 22, 27-28.

We stress that "constitutionalizing" the rule would not "freeze" the matter, nor in the least inhibit needed accommodations. We read the Indian Commerce Clause as deciding no more than that all intercourse between tribal Indians within their reservations and outsiders is, presumptively, an exclusive federal concern, in which the States are off limits, *until and unless Congress determines otherwise*. But, in our view, Congress has unfettered discretion to share that responsibility with States, or to cede or transfer it altogether——as, indeed, has been done in some cases. In sum, all we say is that the Constitution requires congressional leave before the States intervene in Indian affairs. Our submission in no way prevents Congress from experimenting with various schemes of power sharing, or from changing the policy if any program proves unworkable or unwise or unjust.

Our argument is hardly novel. It is well settled that, so long as Indians choose, and are permitted, to retain their tribal relations, within a defined territory recognized as their domain by the national government, State authority over tribal activities there is out of bounds, except as Congress has, in particular cases and particular matters, ordained otherwise. Most relevantly, States cannot regulate or tax reservation members, whether their transactions are with each other or with outsiders, and regardless whether they are buyers or sellers. And this absence of State authority does not appear to depend on any special provision of federal treaty or statute.[1] Why should not the same principle equally exempt the non-Indian partner to the same transaction?

The Indian Commerce Clause, we suggest, supplies a firm basis for that result. Once the federal instrumentality doctrine is discarded, it is not entirely clear why "pervasive regulation" by the federal government suffices to immunize the transaction. After all, the reason for the exemption is presumably to protect *tribal* interests, which would be the same if federal officials released their control and left tribal authorities free to

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[1] Although the Court, in recent years, has avoided any very explicit reliance on the Constitution in Indian cases, constitutional doctrine, including the Indian Commerce Clause, may nevertheless supply a relevant backdrop. The Court has said that "absent cession of jurisdiction or other federal statutes permitting it, there [is] no satisfactory authority for [States] taxing * * * Indian income from activities carried on within the boundaries of the reservation." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). Yet, States surely have ample authority to tax the income of all residents unless federal statutes *prevent* it, or unless some constitutional rule requires congressional consent. So, also, how can non-statutory "rudimentary principles"—unless confirmed by the Constitution—disable States from acquiring Indian land within State boundaries? See *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974).

make their own arrangements—as current policy suggests. One day, it may be hoped, much of Title 25 of the United States Code and the implementing regulations will be repealed, or amended to relax the heavy hand of the federal bureaucracy in favor of Indian self-determination. Must the consequence be to remove the shield that protects the Tribes from more hostile State interference?

As that day approaches—and even now—it becomes important to revisit the Indian Commerce Clause, which, only this Term, the Court characterized as "a shield to protect Indian tribes from state and local interference." *Merrion* v. *Jicarilla Apache Tribe*, *supra*, slip op. 22.

B.

It may be said that we attempt to rest too large a burden on a very narrow footing. Indeed, the Indian Commerce Clause hardly enjoys a place of prominence. On its face, and positioned as it is in the Constitution, the Clause might seem to be a "tag-end" provision, presumably an afterthought. But, when we examine its pedigree, we see that the Indian Commerce Clause is no accident and no weakling.

1. Few things are clearer in our early history than the long and hard, but ultimately successful, effort to nationalize Indian affairs—as a matter of *constitutional law*. Many of the Founding Fathers, Franklin, Washington, Dickinson, Wilson, and Madison, among others, committed themselves to the difficult task, beginning as early as the Albany Congress of 1754 in colonial times,[2] persisting

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[2] The Albany Plan of Union, approved by the colonial Commissioners in July, 1754, and largely drafted by Franklin, would have committed to a general government of the united colonies (consisting of a President-General and a Grand Council) the powers of—

> [H]old[ing] [and] direct[ing] all Indian Treaties in which the General Interest or Welfare of the Colonies may be concerned * * *;

through the regime of the Continental Congress,[3] and continuing through the Constitutional Convention. As one

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> [M]ak[ing] Peace or declar[ing] War with Indian Nations;
>
> [M]ak[ing] all purchases from Indians for the Crown, of Lands now not within the bounds of particular Colonies or that Shall not be within their Bounds when some of them are reduced to more Convenient Dimensions; and—
>
> [M]ak[ing] such Laws as they judge necessary for regulating all Indian Trade.

R. Newbold, *The Albany Congress and Plan of Union of 1754* 186 (1955).

The Plan was rejected or ignored by the Colonial Legislatures and, accordingly, was never enacted by the British Parliament. *Id.* at 135-173. But British attempts to centralize Indian affairs continued until the Revolution. See F. Prucha, *American Indian Policy in the Formative Years* 11-25 (1962).

[3] As early as July, 1775, the Continental Congress sought to take national control of Indian affairs, appointing special commissioners for the purpose, among them Franklin and James Wilson. *Journals of the Continental Congress*, 1774-1789, II, at 174-177, 183 (Lib. of Cong. ed. 1904-1937). The initial drafts of the Articles of Confederation, proposed by Franklin in mid-1775 (*Journal, supra*, II, at 195-199) and, a year later, by John Dickinson (*id.*, V, at 546-554), suggested nationalizing Indian affairs. Indeed, the latter would have unambiguously given Congress "the sole and exclusive Right and Power of * * * Regulating the Trade, and managing all Affairs with the Indians" (*id.*, V, at 550). Wilson, among others, supported the provision (*id.*, VI, at 1077-1079), but State jealousies required compromise. By August 20, 1776, the Indian Article had been qualified to exempt from congressional control relations with Indians deemed "members of any of the States" (*id.*, V, at 682), and, by the end of October, 1777, the ambiguous proviso saving "the legislative right of any State" had been added (*id.*, IX, at 844, 845). Those amendments were retained when, two weeks later, Congress approved the Articles of Confederation. *Id.*, IX, at 907, 919. See, also, M. Jensen, *The Articles of Confederation* 134-135, 152-155, 159 (1940); G. Harmon, *Sixty Years of Indian Affairs* 1-9 (1941).

The experience of divided authority under the Articles only strengthened the resolve of those like Washington and Madison and Henry Knox, who believed Indian affairs ought to be committed exclusively to the national government. See Prucha, *supra*, at 32-40; Harmon, *supra*, at 10-12.

distinguished historian of our early Indian policy has written, among American statesmen dedicated to the principle of Union "there was fundamental agreement that Indian affairs was one area that belonged to the central government." Prucha, *supra*, at 29. From the start, the objective was not merely to confer power on the national government to manage Indian affairs, but to *disable* the colonies or States from doing so. If, as we submit, the architects of the Constitution eventually succeeded, that achievement ought not lightly be cast aside.

2. The first resolution of the question, in the Articles of Confederation, was somewhat ambiguous. While the Congress was expressly granted "the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the [I]ndians," this was limited to Indians "not members of any of the states," and qualified by a proviso preserving "the legislative right of any state within its own limits." Art. 9, *Journals of the Continental Congress*, 1774-1789, IX, at 919 (Lib. of Cong. ed. 1904-1937). This apparent contradiction led to many disagreements, as Madison later observed. *The Federalist* No. 42, at 284 (J. Cooke ed. 1961). The Continental Congress asserted exclusive power, insisting in a Committee Report issued in August 1787, that States ought to "accede to Congress's managing, exclusively, all affairs with * * * independent tribes within the limits of the * * * States, * * * [including] the * * * power of regulating trade * * *." *Journal*, *supra*, XXXIII, at 455, 460. But some States disputed this view and proceeded unilaterally to deal with the Indians.

It was in this setting that Madison proposed a stronger provision at the Constitutional Convention—two weeks after the Report just quoted. He urged expressly giving Congress unrestricted power "[t]o regulate affairs with the Indians, as well within as without the limits of the United States." M. Farrand, *The Records of the Federal Convention of 1787*, II, at 321, 324 (1966). Although this language was substantially revised and removed to its present place in the Commerce Clause, there is not

the slightest indication that the ultimate short-hand did not carry the full scope of Madison's original proposal. See Farrand, *supra*, II, at 493, 495, 497, 499, 503, 569, 595. On the contrary, it is significant that an intervening attempt to qualify federal power by confining it to "Indians, within the Limits of any State, *not subject to the laws thereof*" (Farrand, *supra*, II, at 367; emphasis added), was rejected—presumably because it was seen as reintroducing the concept of divided authority which caused difficulties under the Articles of Confederation.[4]

3. But we need not guess about it. That the advocates of nationalizing the Indian affairs eventually achieved their goal is attested by Madison, by President Washington, by several decisions of this Court, the first written by Chief Justice Marshall, and by the pattern of Congressional legislation and Executive action since that time. The prevailing view has been that, under the Constitution, Indian affairs—like naturalization or foreign affairs—are committed exclusively to the federal government, the role of the States being only such as they may undertake at the invitation of Congress. And, at least in the first century of our constitutional history, this federal monopoly of power was understood to focus on that potentially most troublesome subject, intercourse between tribal Indians and other citizens. Governmental interference in internal tribal affairs was not the issue. See *Ex parte Crow Dog*, 109 U.S. 556, 571-572 (1883). Nor was the primary controversy in respect of taxation of reservation Indians or civil or criminal jurisdiction over them. The main objective of the Indian Commerce Clause

[4] The quoted proposal was reported by the five-member Committee of Detail which did not include Madison (Farrand, *supra*, II, at 97, 106, 321, 325, 366-367). Consideration was postponed (*id.*, II, at 368), the question was recommitted to a Committee of Eleven, including Madison (*id.*, II, at 473, 481), and the present provision then emerged (*id.*, II, at 493, 497), and was agreed to unanimously (*id.*, II, at 495, 499). It would not be fanciful to surmise that, given his strong views on the matter, Madison was responsible for deleting the ambiguous qualification.

was to resolve, in favor of exclusive national power, the dispute as to regulation of dealings between Indians and non-Indians. Until the 1880's, that was the core of "Indian affairs."

We have already noticed Madison's praise of the Indian Commerce Clause in *The Federalist* No. 42, *supra* as granting the national government a power "very properly unfettered from two limitations in the articles of Confederation." President Washington, viewing Indian relations as an exclusive federal concern, repeatedly sought, and obtained, legislation regulating the Indian trade and the traders, ultimately persuading Congress to create the "factory system" of governmentally-operated trading posts. See Prucha, *supra*, at 43-50, 53-54, 61-62; see, also, Harmon, *supra*, at 12, 25, 94-99. That remained the approach of succeeding Presidents, exercising the treaty-making power to deal with Indian affairs, and later acting simply by Executive Order. And, of course, the Congress has never felt restrained by any notion of concurrent State authority in regulating Indian intercourse. On the contrary, the Legislative Branch has consistently acted on the premise that where exercise of State jurisdiction over any aspect of Indian affairs was desirable, a cession or transfer of federal authority was necessary.

4. This Court, also, repeatedly declared the exclusive national authority over Indian affairs. In *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall, after noting the "ambiguous phrases" of the Articles of Confederation, which imposed on the federal power "shackles * * * discarded" in the Constitution, concluded that the "whole power of regulating the intercourse with [the Indians] was vested in the United States." *Id.* at 558-560. See, also, *id.* at 561; *id.* at 590-592, 594 (McLean, J., concurring). Several decades later, the Court repeated the point, expressly stating that "there can be no divided authority" in Indian affairs. *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1866). And, still later, in the specific context of restrictions im-

posed on white traders to the Indians, the Court characterized the power of Congress to regulate commerce with the Indian tribes as "exclusive and absolute." *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876).

In the face of an unchanged constitutional text, it seems a little late in the day to weigh in against such an established consensus and ask the Court to repudiate the constitutional settlement reached two centuries ago.

C.

The argument persists, nevertheless, that the Indian Commerce Clause is an anachronism, written for a day when Indian Tribes were more like foreign nations, living beyond the "frontier," so that it would be inappropriate to invoke the provision in the very changed circumstances now prevailing. We turn to that objection.

1. Of course, our intercourse with the Indian Tribes has altered in two centuries. What has not? But the differences between now and then are not as great as might be assumed, and neither the legal status of the Tribes, nor the reasons behind the decision to nationalize our relations with Indians, have changed very much.

First, although Indian Tribes two hundred years ago occupied far larger territories, a number of them resided within State boundaries. The Constitution itself sufficiently attests to the fact by excluding "Indians not taxes" from the enumeration of State inhabitants used for the purpose of apportioning seats in the House of Representatives. Article I, Section 2, Clause 3. And (as we have seen), the main point of disagreement resolved by the Indian Commerce Clause was control of intercourse with tribal Indians residing "within the States." Nor was "Indian Country," even then, without more or less permanent non-Indian residents. There were already agents, teachers, missionaries, traders, and even unwanted settlers, in the territory of many Tribes.

At the time the Indian Commerce Clause was written, experience had shown that the States were unable or unwilling effectively to control the abuses of local citizens in their dealings with the Indian Tribes, and, in some cases, the States themselves were engaged in treating with the Indians on terms that did not serve the national interest. This is what led many to conclude that the only hope of establishing a just and consistent policy in Indian affairs was to commit the power and responsibility exclusively to the control of the national government. In this Court, it ought not be necessary to argue that, still today, that problem is with us. We need not remind the Court how often, and how recently, it has been called upon to intervene—not uncommonly at the instance of the United States—when States failed to respect or protect tribal rights and immunities, whether with respect to land, or water, or fishing, or self-government, or taxation.[5]

This is not to deny that one of the motives for centralizing Indian affairs—fear that locally sanctioned abuses would provoke powerful Tribes into hostile acts or unfriendly alliances—has disappeared. Or that the commodities of trade—once largely furs and pelts and horses in one direction, guns and whiskey in the other—have changed. But whether informed by considerations of national defense, or self-interest, or simple justice, the constitutional rule federalizing regulation of Indian commerce has never lacked a firm basis.

2. At all events, as we have seen, the Court continued, at least until 1876, to read the Indian Commerce Clause

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[5] Long after the adoption of the Fourteenth Amendment—including the Equal Protection Clause that embraces non-citizens—this Court summarized the situation of Indian tribes within State boundaries: "They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *United States* v. *Kagama*, 118 U.S. 375, 384 (1886). Unfortunately, that reality is not everywhere ancient history.

as an independent barrier to State interference in Indian affairs. This has led some to suggest that, although in force for a century, the constitutional rule changed about a hundred years ago. See Brief of the States of Montana, et al., at 12.

It is true, of course, that a new approach to Indian affairs was inaugurated by Congress in the 1880's. The first step was more pervasive federal intrusion in reservation affairs, including, for the first time, imposition of the white man's criminal law on offenses committed by one Indian against another. See *United States* v. *Kagama*, *supra*.[6] And this was shortly followed, in the General Allotment Act of 1887, by a scheme ultimately designed to "assimilate" the Indian and subject him to State law. It is familiar history that these policies persisted until the late 1920's and effectively opened up many Indian reservations to white settlers. So, alone, more recent legislation, including Public Law 280 in 1953 and subsequent Termination Acts, renewed the trend for a short span. See *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). The upshot is that some Indian reservations were disestablished (*e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977)), many were diminished in extent (*e.g.*, *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975)), and a substantial number of non-Indians acquired tracts and took up residence within reservations. Moreover, some States assumed jurisdiction over criminal offenses and civil disputes occurring there, or did so in part (*e.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979)), and, in some cases, accepted other responsibilities as well (*e.g.*, *Montana* v. *United States*, 450 U.S. 544 (1981)).

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[6] In *Kagama*, the Court gave the Indian Commerce Clause a perhaps unduly narrow construction. 118 U.S. at 378-379. But that was in the context of sustaining a federal criminal statute that punished offenses committed by one Indian against another "without any reference * * * to any kind of commerce." *Id.* at 379. Yet, the Court was clear that Congress was authorized to enact the Major Crimes Act, in part because the States lacked any comparable power. *Id.* at 383-385.

Unquestionably, these developments have changed the map and complicated the legal situation. Indeed, had the allotment policy and the later termination program been carried to the end, Indian enclaves would have ceased to exist and Indian "tribes" would have lost their separate status. In that event, the Indian Commerce Clause, although unrepealed, would have lost its bite, for lack of any subject matter.

3. But, as is well known, the direction was reversed, both in the mid-1930's and, again, in the mid-1960's, and no irrevocable destruction of Indian tribes occurred. As this Court has stressed, "allotment * * * is completely consistent with continued reservation status" (*Mattz* v. *Arnett*, 412 U.S. 481, 497 (1973)), and Public Law 280 did not "effect total assimilation" and convert "the affected tribes into little more than 'private, voluntary organizations'" (*Bryan* v. *Itasca County*, 426 U.S. 373, 387-388 (1976), quoting from *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975)). Moreover, for a decade at least, the express policy of the United States has been to foster tribal self-government and self-sufficiency. See *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 388-389 n.14. It hardly needs saying that this Court has generously accepted that political decision, emphatically declaring the continuing identity of Indian tribes, with a limited, but significant, residual sovereignty over both their members and their territory. *E.g.*, *Washington* v. *Confederated Tribes*, *supra*, 447 U.S. at 152-154; *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 142, 151; *Merrion* v. *Jicarilla Apache Tribe*, *supra*, slip op. 7-18.

In these circumstances, we do not appreciate how it can be said that the Indian Commerce Clause has lost its force. The geographical scope of the provision has been cut down. And it no longer maintains an absolute wall around Indian enclaves. But that is true only because, and to the extent, that Congress has invited State law to enter. That the Legislative Branch has opened doors in the wall for limited purposes is no pretext for ignoring

the boundary altogether, especially when Congress itself has repudiated its former policy. As this Court has stressed, "when Congress has wished the States to [regulate the affairs of Indians on a reservation] it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* had denied." *Williams* v. *Lee*, *supra*, 358 U.S. at 221; see also *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 389-390. Now, as before, the congressional assumption is that State authority within Indian reservations is lacking absent express federal legislation conferring such power. See *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 175 & n.13, 177-178 (1973). In our view, that approach is faithful to the Constitutional arrangement reached two centuries ago and still relevant today.

D.

To say that the Indian Commerce Clause remains alive and well does not, of course, mean that, of its own force, it must today be deemed to grant an "automatic" exemption from State regulation or taxation for all activities touching Indian interests—except as Congress has expressly provided otherwise. It is no affront to the constitutional principle that Indian affairs are, in the first instance, an exclusive federal concern, to concede State jurisdiction over non-Indians who commit crimes against each other within the boundaries of a reservation, or who choose that locale to engage in commercial dealings with each other. Nor does it offend the Indian Commerce Clause to permit the State to tax its non-Indian citizens residing within an Indian reservation in respect of their fee lands or their personal property or income not directly traceable to Indian transactions. After all, the Clause reaches only "commerce . . . *with* the Indian Tribes."

Nor is it necessary to extend the umbrella of the Indian Commerce Clause beyond reservation boundaries. It is reasonable to view the Clause as focusing on what used to be known as "Indian country," which is today

effectively the diminished area of Indian reservations. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), teaches that even tribal income from off-reservation enterprises is not exempt from State taxation. And, finally, we must accept that a reservation situs is not always sufficient to immunize the transaction, if that nexus is no more than a device to avoid taxation. *Washington* v. *Confederated Tribes*, *supra*.

But on-reservation activities or transactions significantly involving the resident tribe, it seems to us, *are* sheltered from State interference by the Indian Commerce Clause—or, at least, presumptively so. Thus, in the present case, it seems plain the State has no jurisdiction over the building of the Navajo school, or the contracts involved. Even if there were no governing federal regulations, we do not suppose New Mexico could assert that its zoning laws, or its building code, or its contract law, were applicable to this activity. And that would be true even if the "legal incidence" of regulation fell on the non-Indian contractor, rather than the Indian school board. The reason, of course, is that the Indian Commerce Clause exempts from State regulation the *whole* activity or transaction, not merely the Indian partner.

In our view, no different result is required because New Mexico is asserting *taxing* power, which is more easily focused on one party to a contract. After all, the State is in no way involved: its laws are not implicated, its officials are performing no role. Yet, although contributing nothing to the transaction, the State is seeking to exact a price. In sum, our submission is that, regardless of actual federal regulation, when a transaction with tribal Indians is off-limits to the State, it can no more tax it than regulate it.

This much, we believe, is mandated by the Indian Commerce Clause. Within this restricted sphere, the Clause still protects Indian commerce from State interference. Of course, Congress remains free to relinquish its monopoly of power to regulate white-Indian relations

to the States, and, in significant respects, it has done so. But, except as legislation can be shown to have worked such a transfer, or the Tribes, by assimilation or otherwise, have surrendered the benefit of the Nation's special protection, the constitutional rule must remain the same. It can hardly be admitted that the Indian Commerce Clause has lost its shielding force because intervening events have suggested a different solution, or because this Court has been shy about invoking it.

For the reasons stated here and in our opening brief, the judgment of the New Mexico Court of Appeals should be reversed.

Respectfully submitted.

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